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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LIKING SOLOMON JOHNSON, Defendant and Appellant.	B176177 (Los Angeles County Super. Ct. No. TA072073)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jack Morgan, Judge. Modified and, as so modified, affirmed.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Paul M. Roadarmel, Jr., Deputy Attorney General, for Plaintiff and Respondent.

Liking Solomon Johnson appeals the judgment entered after conviction by jury of two counts of robbery and one count of false imprisonment by violence. (Pen. Code, §§ 211, 236.)[1] The jury found Johnson personally used a firearm in the commission of each count within the meaning of section 12022.53, subdivision (b), or section 12022.5, subdivision (a). The trial court sentenced Johnson to a prison term of 30 years and 8 months. We reject Johnson's claims of evidentiary and instructional error but reduce the firearm enhancements associated with the subordinate counts by two-thirds, leaving an unstayed term of 21 years in state prison. As so modified, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Prosecution's evidence.*

On October 1, 2003, Elizabeth Buenrostro, a graduate of Jordan High School, planned to open a cellular telephone store near the school. On September 27, 2003, her brother, Jose Buenrostro, and his girlfriend, Roselda Olmeda, were helping in the store. Jackson stopped at the store three times that day, inquiring about prices. On the third occasion, Johnson and two companions interrupted Jose at about 4:00 p.m. as Jose hung a banner on the outside of the store. Jose accompanied Johnson and his companions into the store where they discussed the purchase of a SIM card with Elizabeth.

As the discussion continued, the three males separated, produced firearms and demanded the cell phones and accessories in the store. One of the robbers, codefendant Howard Easter, had an Uzi submachine gun, Johnson had a sawed-off shotgun, and the third male had a handgun.

Easter ordered everyone to the floor and motioned the Uzi toward Olmeda who was seated on a couch with two small children who frequented the shop. Olmeda complied and laid on the floor with the children who started to scream. Easter took Jose's chain, watch, ring and cell phone. Johnson produced a black plastic bag and demanded that Elizabeth open the display cases. Johnson loaded cell phones and

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[1] Subsequent unspecified statutory references are to the Penal Code.

accessories from the display cases into the bag. The robbers took Elizabeth's chain and emptied her pockets.

Elizabeth and Jose both recognized Johnson because they had attended Jordan High School with him. Jose had seen Johnson at football practice at Jordan High School numerous times. Elizabeth and Jose both identified Johnson in a Jordan High School yearbook, at the preliminary hearing and at trial.

Detective Michael Bautista conducted a consensual search of two homes located next to each other on East 105th Street where Johnson and his extended family lived. Motorola cell phones found in numerous areas of Johnson's home were similar to the phones taken in the robbery. A short shotgun and a pistol were found hidden in the attic. Both weapons were loaded. The shotgun found in the attic resembled the weapon Johnson used in the robbery.

Johnson's palm print was found in the shop on the bottom of a display case.

2. *Defense evidence*.

Easter testified in his own defense and denied participation in the robbery.

Johnson testified he had been in the store shopping for a telephone when the robbers, Keon Coles and Mike T., entered. As Johnson discussed a telephone with Elizabeth, Coles and Mike T. produced handguns and robbed her. Johnson opportunistically tried to take a display box but it was Coles who went behind the counter and placed property in a bag. Johnson denied he had been armed and denied Coles or Mike T. had an Uzi or a shotgun. Johnson denied he had ever seen the shotgun found in the attic.

3. *Verdicts*.

The jury acquitted Easter but found Johnson guilty of armed robbery of Elizabeth and Jose and false imprisonment by violence of Olmeda committed with the personal use of a shotgun.

CONTENTIONS

Johnson contends: the evidence is insufficient to support the conviction of felony false imprisonment; the trial court erroneously failed to instruct on the lesser-included offense of misdemeanor false imprisonment; defense counsel rendered ineffective assistance in failing to request instruction on the lesser included offense; and, the trial court committed sentencing error.

DISCUSSION

1. *The evidence supports the conviction of felony false imprisonment.*

Johnson contends the evidence does not demonstrate the use of any force beyond that required for the simple restraint of Olmeda. Accordingly, the conviction of felony false imprisonment must be reduced to a misdemeanor. (*People v. Babich* (1993) 14 Cal.App.4th 801, 808-809.) Johnson notes the robbers drew firearms and ordered Olmeda to the floor and she complied. Johnson asserts the display of the firearms was the means by which the restraint of Olmeda was effected. Johnson argues it cannot reasonably be assumed Olmeda would have complied with the command had Johnson not been armed because Jose, a former football player, would have been a formidable adversary for unarmed assailants.

Johnson notes he did not threaten to kill Olmeda as was the case in *People v. Bamba* (1997) 58 Cal.App.4th 1113, 1124. Nor did Johnson verbally threaten anyone or attempt physical harm to any of the victims. (Cf. *People v. Raley* (1992) 2 Cal.4th 870, 907 [express threat to beat victims with a belt if they refused to comply with the defendant's demands]; *People v. Reed* (2000) 78 Cal.App.4th 274, 281 [defendants pressed firearms against the heads of the victims]; *People v. Arvanites* (1971) 17 Cal.App.3d 1052, 1060 [implied threat of physical harm].) Johnson concludes the evidence is insufficient to support conviction of felony false imprisonment on a theory of violence.

Johnson's claim lacks merit.

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236; *People v. Matian* (1995) 35 Cal.App.4th 480, 484.) It is a misdemeanor if no force is used beyond that necessary to restrain the victim's freedom of movement. "All that is necessary is that ' "the individual be restrained of his liberty without any sufficient complaint or authority therefor, and it may be accomplished by words or acts . . . which such individual fears to disregard." [Citations.]' [Citation.]" (*People v. Babich, supra,* 14 Cal.App.4th at p. 806; *People v. Reed, supra,* 78 Cal.App.4th at p. 280.)

"If the imprisonment is effected without the use of violence, menace, fraud or deceit, it is a misdemeanor. The presence of one or more of these elements elevates the false imprisonment to a felony." (*People v. Haney* (1977) 75 Cal.App.3d 308, 313; *People v. Reed, supra,* 78 Cal.App.4th at p. 280; *People v. Bamba, supra,* 58 Cal.App.4th at pp. 1121, 1123; *People v. Babich*, *supra*, 14 Cal.App.4th at p. 806.)

Violence, for purposes of this crime, is " ' "the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint." ' " (*People v. Matian, supra,* 35 Cal.App.4th at p. 484.) Menace is " ' " 'a threat of harm express or implied by word or act.' " ' " (*People v. Reed, supra,* 78 Cal.App.4th at p. 280; *People v. Matian, supra,* at p. 484.) As explained in *Matian,* "[t]he reported decisions upholding convictions for felony false imprisonment involving menace generally fall into two categories. In the first category of cases there was evidence the defendant used a deadly weapon to effect the false imprisonment. . . . [¶] The second category of cases upholding convictions for felony false imprisonment involving menace presented evidence the defendant verbally threatened harm." (*People v. Matain, supra,* 35 Cal.App.4th at pp. 485-486.)

Here, the presence of three firearms, including an Uzi submachine gun and a sawed off shotgun, reasonably support the jury's conclusion the restraint of Roselda was achieved by menace or violence.

Johnson claims this court must affirm the conviction on the ground of violence because the verdict form indicates the jury found Johnson guilty of false imprisonment by violence. However, the information charged Johnson with false imprisonment of Olmeda by "violence, menace, fraud and deceit" and the trial court instructed the jury on false imprisonment by violence and by menace. Under these circumstances, the verdict properly may be sustained on a theory of violence or menace. In any event, even if we agreed with Johnson's limitation on the theories available, the use of numerous high powered weapons is sufficient to demonstrate false imprisonment by violence.

For all the foregoing reasons, the evidence plainly was sufficient to permit the jury to conclude Johnson threatened physical harm greater than was necessary to restrain Olmeda. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

2. *The trial court had no sua sponte obligation to instruct on misdemeanor false imprisonment.*

Johnson contends the trial court should have instructed sua sponte on the lesser-included offense of misdemeanor false imprisonment and defense counsel rendered ineffective assistance in failing to request the instruction. These claims fail.

A trial court must instruct the jury on lesser included offenses whenever there is substantial evidence from which a reasonable jury could conclude that a lesser offense, and not the greater offense, was committed. (*People v. Koontz, supra,* 27 Cal .4th at p. 1085; *People v. Breverman* (1998) 19 Cal.4th 142, 162; *People v. Matian, supra,* 35 Cal.App.4th at p. 484, fn. 4.) On the other hand, the court is not obliged to instruct on theories that have no substantial support. (*People v. Breverman, supra,* 19 C.4th at p. 162.) Thus, instructions on lesser included offenses are required when there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 118.)

Misdemeanor false imprisonment is a necessarily included lesser offense of felony false imprisonment. (*People v. Matian, supra,* 35 Cal.App.4th at p. 487.) However, there was not substantial support for the assertion Johnson committed only misdemeanor false imprisonment. The jury found Johnson personally used a firearm in the commission of the robbery and attempted robbery, thereby rejecting Johnson's claim he opportunistically participated in the robbery and was unarmed. Thus, Johnson and his companions used a sawed-off shotgun, an Uzi submachine gun and a handgun to effect the false imprisonment of Olmeda. Clearly, this constitutes excessive force over that required to restrain the victim. Indeed, the use of a firearm is inherently threatening violence and is menacing. There was no credible evidence Johnson committed any offenses other than felony false imprisonment. Accordingly, no different result would have obtained had the jury been instructed as Johnson suggests.

Because Johnson cannot demonstrate prejudice in defense counsel's failure to request instruction on the lesser included offense, his related claim of ineffective assistance of counsel also fails. (*In re Harris* (1993) 5 Cal.4th 813, 833; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

3. *Sentencing issues*.

a. *The term imposed.*

The trial court sentenced Johnson to the upper term of five years for robbery in count one, plus 10 years for the personal use of a firearm within the meaning of section 12022.53, subdivision (b). With respect to count two, the trial court sentenced Johnson to a consecutive term of one year and a full term consecutive firearm enhancement of 10 years pursuant to section 12022.53, subdivision (b). With respect to count three, the trial court sentenced Johnson to a consecutive term of eight months and a full term four-year consecutive firearm enhancement, for a total unstayed term of 30 years and eight months in state prison.

b. *Johnson's contentions.*

Johnson contends the upper term imposed for robbery in count one and the consecutive terms imposed on counts two and three violate *Blakely v. Washington* (2004) 542 U.S. ----, 124 S.Ct. 2531, 159 L.Ed.2d 403 (*Blakely*). He also asserts the consecutive firearm use enhancements must be reduced by two-thirds.

(1) *The upper term for robbery*.

Apprendi v. New Jersey (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435] (*Apprendi*), held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely* extended *Apprendi* to circumstances where a defendant's punishment is increased by the use of facts other than those based solely on a jury verdict or a plea.

Applying *Blakely* here, Johnson argues the findings the trial court used to support the upper term were not found by a jury beyond a reasonable doubt. Thus, the upper term is invalid.

The People contend Johnson has waived these claims for failure to object at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 353-354; *People v. Saunders* (1993) 5 Cal.4th 580, 590.) The People note courts previously have applied waiver principles to *Apprendi* claims and similar principles should apply to *Blakely* claims. (*United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860].)

We do not find the People's waiver argument persuasive. *Blakely* extended the *Apprendi* rationale into a new area. Thus, Johnson cannot be said to have waived the *Blakely* contention. (See *People v. Harless* (2004) 125 Cal.App.4th 70, 97, petn. for review filed Jan. 27, 2005.)

With respect to the merits, the People argue an upper term imposed under California law does not violate *Blakely* because it is one of three authorized terms that result from a robbery conviction. Alternatively, the People contend the jury's finding Johnson personally used a firearm in the commission of the charged offenses supports the trial court's finding the robbery involved "violence demonstrating serious danger to society." The People also assert the trial court's reliance on Johnson's criminal history falls within the recidivism exception to *Apprendi* and therefore withstands the claim of *Blakely* error. (*Almendarez-Torres v. United States* (1998) 523 U.S. 224 [140 L.Ed.2d 350].)

Finally, the People argue any *Blakely* error was harmless given that the jury would have found any aggravating factors submitted to it true beyond a reasonable doubt. (*Sengpadychith, supra,* 26 Cal.4th at 327; *United States v. Cotton, supra,* 535 U.S. at pp. 634-635.) The People conclude the aggravating factors found by the trial court, the violence of the crime, the recidivism of the appellant and the existence of multiple victims, and the absence of any factors in mitigation, compels the conclusion Johnson is unable to demonstrate prejudice.

The People suggest the trial court properly could rely on the jury's finding Johnson personally used a firearm in the commission of the charged offenses to support the upper term. However, given that the trial court imposed a consecutive firearm enhancement on each count and imposed consecutive subordinate terms, reliance on the firearm use enhancements to support the upper term for robbery would constitute a prohibited dual use. (See Cal. Rules of Court, rule 4.425(b); *People v. Bejarano* (1981) 114 Cal.App.3d 693, 704.) Also, Johnson's "criminal history" is not the equivalent of a finding Johnson suffered a prior conviction.

Notwithstanding these observations or the fact the applicability of *Blakely* to an upper term is pending before the California Supreme Court (see *People v. Towne,* review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182), the recent case of *United States v. Booker* (2005) 543 U.S. ---- [2005 WL

50108] suggests the People's view that an upper term imposed under California law does not violate *Blakely* will prevail. In upholding the Federal Sentencing Guidelines by declaring them advisory, rather than mandatory, *Booker* noted: "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. [Citations.]" (*United States v. Booker, supra,* 543 U.S. ---- at p. ----.)

Because a trial court in California has discretion to select the upper middle or lower term, application of *Booker* indicates imposition of an upper term under California's determinate sentencing law does not violate *Blakely*. Accordingly, Johnson's claim with respect to the upper term for robbery fails.

(2) *The consecutive terms for robbery and false imprisonment.*

With respect to the consecutive terms, Johnson was convicted of robbery of Elizabeth in count one, robbery of Jose in count two and false imprisonment of Olmeda by violence in count three. Each count involved a separate victim and each count was supported by a separate jury verdict. Because each count is supported by a jury verdict, the consecutive terms imposed do not violate Johnson's interpretation of *Blakely*.

(3) *The consecutive firearm enhancements*.

Johnson also asserts the full term consecutive firearm enhancement of 10 years imposed on count two and four years imposed on count two must be reduced by two-thirds. (*People v. Moody* (2002) 96 Cal.App.4th 987, 992-993; § 1170.1)

The People concede the point and their concession appears well-taken. Accordingly, the 10-year enhancement associated with the subordinate term for robbery in count two is reduced to 40 months or 3 years and 4 months, and the four year enhancement associated with the subordinate term in count four for false imprisonment is reduced to one year and four months. As so modified, the total unstayed term is 20 years and 8 months in state prison.

DISPOSITION

The judgment is modified to reflect a consecutive firearm enhancement of three years and four months with respect to count two and a consecutive firearm enhancement of one year and four months with respect to count four. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare and forward to the Department of Corrections an amended abstract of judgment.

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KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.